



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 9, 1994

Honorable Ken Armbrister
Chair
Committee on Intergovernmental Relations
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 94-051

Re: Whether wagering on the outcome of sporting events constitutes illegal gambling under section 47.02 of the Penal Code (ID# 25193)

Dear Senator Armbrister:

You ask whether a certain kind of contest would be in violation of the proscription on gambling in section 47.02 of the Penal Code or constitute a "lottery" under section 47.01(6). The contest in question you say

requires an entry fee and will pay prizes to the winners among the actual contestants and . . . is based on forecasting the outcome of a substantial number of sporting events (approximately 150) using the skills necessary to analyze relevant data, including, but not limited to, point differentials as published in newspapers of general circulation, weather conditions, injuries, or other factors

Subsection (a) of section 47.02, "Gambling," provides:

A person commits an offense if he:

- (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;
- (2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate.

The word "bet" as used in section 47.02 is defined in section 47.01(1) as "an agreement . . . to win or lose something of value" solely or partially by chance. Specifically excluded from the definition of "bet" are certain indemnity, guaranty, or insurance contracts, and "offers of merchandise" in "carnival" contests--but as the facts you present do not appear to raise any of these exceptions we will assume they do not apply in the case of the contest you are asking about. See Penal Code § 47.01(1)(A), (C), (D).¹

¹Similarly, as your request does not raise the possible applicability of any statutory defenses to prosecution for gambling, we assume for purposes of this opinion that none of those defenses is relevant here. See, e.g., Penal Code § 47.02(c); (making it a defense to prosecution that activities were permitted

You do refer in your request letter to the exclusion from the definition of "bet" set out in subsection (1)(B) of section 47.01. We take that together with your use of the words "actual contestants" in your description of the contest as suggesting that you are concerned whether entering the contest here falls within that exclusion from the definition of "bet," which reads:

A bet does not include:

....

(B) an offer of a prize, award, or compensation to the *actual contestants* in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest.

Id. § 47.01(1)(B)(emphasis added).

The Practice Commentary appearing in Vernon's after section 47.01 states that the subsection (1)(B) exclusion "is intended to exclude only awards and compensation earned by direct participation in the contest--the pole-vaulter's cup, the pro football player's salary--not the receipt of a wager made on its outcome." We agree with this view. We cannot think of any distinction the words "*actual contestants*" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace those who pay entry fees for a chance to win a prize from forecasting the outcome of the events.

Your emphasis on the skill element involved in the contest in question suggests the additional concern with the applicability to this contest of the language "dependent on chance even though accompanied by some skill" in the section 47.01(1) definition of "bet." Although it might be urged that forecasting outcomes of sporting events could rise to the level of a science such that elements of chance were drastically reduced, the same could be argued for wagering on the outcome of elections. That wagering on elections is included in the section 47.02 prohibition on gambling, however, is clear from the face the provisions themselves. *See id.* §§ 47.02(a)(2), 47.03(a)(4). We note too that, albeit under differently worded provisions antedating those in the current Penal Code, Texas courts have consistently held wagering on the outcomes of horse or dog races to be gambling. *See, e.g., Reed v. Fulton*, 384 S.W.2d 173 (Tex. Civ. App.--Corpus Christi 1964, writ ref'd n.r.e.). Generally speaking, we think courts have taken for granted, in the gambling law context, that wagering on the outcome of an athletic event is a "game of chance." *United States v. Thompson*, 409 Fed. Supp. 1044 (D. Montana 1976). We believe a

(footnote continued)

under the Bingo Enabling, Charitable Raffle Enabling, or Texas Racing Acts); *see also id.* § 47.02(b)(1) ("private place" defense).

Texas court would find that wagering on the outcomes of sporting events constitutes "gambling" under section 47.02.

Since we find that the scheme you describe would violate the Penal Code prohibitions on gambling, we do not think it necessary here to reach the question whether the scheme would also constitute a "lottery" within the definition in section 47.01(6). Resolution of that issue might well, in any case, require further factual determinations as to the nature of the scheme in question which we would be unable to undertake in the opinion process. *See generally* Attorney General Opinion JM-1267 (1990) (whether certain casino games involve sufficient "chance" so as to fall within the definition of "lottery," as a scheme involving the payment of consideration for the chance to win a prize, may involve questions of fact).

S U M M A R Y

Non-participants' wagering on the outcome of sporting events constitutes illegal gambling under section 47.02 of the Penal Code.

Yours very truly,



William M. Walker
Assistant Attorney General
Opinion Committee